provision in its most common and important application. Intervention by this Court is required.

I. The Circuits Are Irreconcilably Divided Over The Construction Of 18 U.S.C. 3584(a).

As the government has acknowledged in *Cox*, the Sixth and Ninth Circuits interpret Section 3584(a) to withhold from a district court the power to determine whether its sentence shall run concurrently or consecutively to a future sentence that may be imposed by another court. See *Cox* BIO 5; *United States* v. *Quintero*, 157 F.3d 1038, 1039-40 (CA6 1998); *United States* v. *Clayton*, 927 F.2d 491, 492 (CA9 1991). When, as in this case, the defendant is not "already subject to an undischarged term of imprisonment," these courts hold, the decision whether any future sentence shall be served consecutively to the initial federal sentence is left to the later sentencing court.[4]

---

[4] Although the Second Circuit had interpreted a predecessor to Section 3584(a) as granting federal courts authority to order a sentence to run consecutively to an unimposed state sentence, see *Salley* v. *United States*, 786 F.2d 546, 547-48 (CA2 1986), that court has more recently held (in square conflict with the Seventh Circuit, see *infra* at 9) that Section 3584(a) does not establish a default rule that a federal sentence will run consecutively to an unimposed state sentence when the federal sentencing judge is silent. See *Abdul-Malik* v. *Hawk-Sawyer*, 403 F.3d 72, 75 (CA2 2005) ("the absence of any specification by the federal court as to whether its sentence should run concurrently or consecutively does not signify intent that the sentences run consecutively because the federal court may not even know that another sentence is about to be imposed"); *McCarthy* v. *Doe*, 146 F.3d 118, 122 (CA2 1998) ("there is no basis to infer any intention as to consecutive or concurrent service from the [federal] sentencing judge's silence, which could equally well indicate either that the judge did not know another sentence would be imposed, or did not know what the future [state] sentence would be").

Accordingly, there is no question that had petitioner been sentenced in Detroit or San Francisco, his term of imprisonment would be substantially less than it is in this case solely because he was sentenced instead in Fort Worth, Texas. Indeed, as the government has acknowledged, the Fifth, Eighth, Tenth, and Eleventh Circuits all adopted precisely the opposite of the rule applied in the Sixth and Ninth Circuits, holding that a federal court has the power to order that its sentence be served consecutively to a sentence of another court, even if that sentence has not yet been imposed. See Pet. App. 2a; *United States* v. *Andrews*, 330 F.3d 1305, 1307 (CA11), cert. denied, 540 U.S. 1003 (2003); *United States* v. *Sumlin*, 317 F.3d 780, 782 (CA8 2003); *United States* v. *Hernandez*, 234 F.3d 252, 256 (CA5 2000) (per curiam); *United States* v. *Williams*, 46 F.3d 57, 58-59 (CA10), cert. denied, 516 U.S. 826 (1995). These courts reject the view that by specifically authorizing a federal court to decide whether its sentence shall be consecutive when the defendant is "already subject to an undischarged term of imprisonment," Congress has withheld the power to make the sentence consecutive to a sentence that has not yet been imposed. See, *e.g.*, *Williams*, 46 F.3d at 59.

The circuits further disagree as to the meaning of the final sentence of Section 3584(a), which states that "[m]ultiple terms of imprisonment imposed at different times run consecutively unless the court orders that the terms are to run concurrently." The Sixth Circuit reads that sentence as applying only when the second sentencing court fails to designate whether the later sentence shall be consecutive or concurrent. See *Quintero*, 157 F.3d at 1040.[5] The Tenth Circuit, on the other hand, reads the sentence as requiring consecutive sentences even if the second sentence is imposed by a state court and even if that state court specifies that its sentence shall be served concurrent to a prior federal sentence. See *Williams*, 46 F.3d at 58.

---

[5] See also *McCarthy*, 146 F.3d at 121-22.

The Seventh Circuit has adopted elements from each side of the split. See *Romandine* v. *United States*, 206 F.3d 731 (CA7 2000). The Seventh Circuit essentially agrees with the Sixth and Ninth Circuits that "[n]either sec. 3584(a) nor any other statute of which we are aware authorizes a federal judge to declare that his sentence must run consecutively to some sentence that may be imposed in the future." *Id.* at 737. Nonetheless, like the Tenth Circuit, that court construes the final sentence of Section 3584(a) as rendering *all* federal sentences consecutive to any future sentence that may be imposed by another court, even if neither the first nor the second sentencing court concludes that consecutive sentences are appropriate. *Id.* at 737-38. However, the Seventh Circuit has suggested, this result may be circumvented by the BOP designating the state prison as the "official detention facility at which the sentence is to be served," in which case the inmate would be given credit on his federal sentence for time served for the state conviction. *Id.* at 738 (quoting 18 U.S.C. 3621(b)). But that decision is left, in the Seventh Circuit's view alone, to the executive branch, not to the district court. *Ibid.*[6] Significantly, the BOP itself has rejected the Seventh Circuit's view and considers itself bound by the district court's determination of whether the prior federal sentence is to be served consecutive to a subsequently imposed sentence of another court. See BOP Program Statement 5160.05 ¶ 9(b)(4)(f); *id.* 5880.28, at 1-32A.

2. The government does not dispute that the split is mature, entrenched, and intractable. The conflict has persisted since at least 1991 and has broadened, rather than narrowed, in recent years. Compare, *e.g.*, *United States* v.

---

[6] See also *United States* v. *Randolph*, 80 Fed. Appx. 190, 196 (CA3 Oct. 20, 2003) (unpublished) ("a defendant in Randolph's position must serve his state and federal terms of imprisonment consecutively unless he can convince the Bureau of Prisons to designate the state prison as 'the official detention facility at which the sentence is to be served'").

Mayotte, 249 F.3d 797, 798 (CA8 2001) (district court has power to order sentence to be served concurrent or consecutive to later sentence) with *Romandine* v. *United States*, 206 F.3d 731 (CA7 2000) (district court lacks that power, although separate sentences are consecutive by default); *Abdul-Malik* v. *Hawk-Sawyer*, 403 F.3d 72, 74 (CA2 2005) (rejecting Seventh Circuit holding that separate sentences are consecutive by default); and *United States* v. *Quintero*, 157 F.3d 1038, 1039-40 (CA6 1998) (district court lacks power to order sentence served concurrent or consecutive to future sentence, and sentences are not consecutive by default).

Moreover, the disagreement is considered, not inadvertent. For example, in *Quintero*, the Sixth Circuit expressly acknowledged the divergent views of the circuits adhering to the majority rule but nonetheless declined to follow those courts, reasoning that its construction of the statute was most consistent with the text and legislative history of the statute. See 157 F.3d at 1040. By contrast, in *United States* v. *Mayotte*, 249 F.3d 797, 799 (2001), the Eighth Circuit acknowledged not only the circuit split but also the "concerns discussed by the circuits holding the minority view" – namely, that conferring power on a federal court to control how a later-imposed state sentence is served undermines principles of comity and that conferring that power on the Attorney General raises separation-of-powers problems. Nonetheless, the Eighth Circuit was "persuaded to adopt the majority view." *Ibid.* See also, *e.g.*, *Romandine*, 206 F.3d at 738 (Seventh Circuit acknowledging split); *Andrews*, 330 F.3d at 1306 (Eleventh Circuit acknowledging split).

Nor is there any realistic prospect that the courts of appeals will resolve the division themselves. For example, the Tenth Circuit recently denied a petition for rehearing en banc in *Cox*. See *Cox* Pet. App. 2a. Moreover, at least five circuits now regard their prior holdings as sufficiently settled that they simply cite their prior cases without further

elaboration. See, *e.g.*, *ibid.* (noting Cox's argument but concluding that that in light of prior circuit precedent the "panel can do nothing for him"); *Andrews*, 330 F.3d at 1307 ("we cannot ignore *Ballard*'s clear holding that a court does have the authority to impose a consecutive sentence to an unimposed, future sentence"); *United States* v. *Sumlin*, 317 F.3d 780, 782 (CA8 2003) (deeming the holding in *Mayotte* "dispositive" of the question whether district courts have authority to require that sentence run consecutively to unimposed sentence); *United States* v. *Hernandez*, 234 F.3d 252, 256 (CA5 2000) ("under our precedent, the district court may order that a federal sentence run concurrent with a forthcoming state sentence"); *United States* v. *Stewart*, 71 Fed. Appx. 590, 592 (CA7 Jul. 30, 2003) (unpublished) (relying, without any additional discussion, on *Romandine*).

Finally, as noted above, this Court's intervention is further warranted because the question presented is frequently recurring, arising not only on direct appeal,[7] but also – as this case demonstrates – in federal post-conviction proceedings.[8]

---

[7] See, *e.g.*, *Andrews*, 330 F.3d 1305; *United States* v. *Floyd*, 80 Fed. Appx. 87 (CA10 Oct. 30, 2003) (unpublished); *United States* v. *McDaniel*, 338 F.3d 1287 (CA11 2003); *Stewart*, 71 Fed. Appx. 590; *Sumlin*, 317 F.3d 780; *Mayotte*, 249 F.3d 797; *Quintero*, 157 F.3d 1038; *United States* v. *Ballard*, 6 F.3d 1502 (CA11 1993); *United States* v. *Brown*, 920 F.2d 1212 (CA5 1991); *Clayton*, 927 F.2d 491.

[8] See, *e.g.*, *Brown* v. *Ashcroft*, 41 Fed. Appx. 873 (CA7 June 21, 2002) (unpublished); *Jones* v. *Winn*, 13 Fed. Appx. 419 (CA7 Jun. 29, 2001) (unpublished) (same); *Hernandez*, 234 F.3d 252; *Romandine*, 206 F.3d 731; *Tinsley* v. *United States*, No. 95-5564, 1997 U.S. App. LEXIS 2688, at *11 (CA6 Feb. 12, 1997) (unpublished); *United States* v. *Neely*, 38 F.3d 458 (CA9 1994) (per curiam).

II. Resolution Of The Circuit Split Is Necessary To Ensure Fair Treatment Of Similarly Situated Defendants And To End The Unauthorized Invasion Of State Sentencing Prerogatives.

The current division among the courts of appeals is untenable, creating substantial sentencing disparities based on accidents of geography and permitting an unremitting invasion of state court sentencing prerogatives Congress intended to protect.

1. The circuit conflict predictably results in substantially disparate treatment of similarly situated federal defendants, even among those serving time in the same federal prison for indistinguishable offenses.

In this case, for example, there can be no dispute that if petitioner had been sentenced in Tennessee rather than Texas, his time in custody would have been reduced by nearly a third. The disparity in other cases can be even more substantial. For example, unless this Court intervenes, the defendant in *Cox* likely will remain in prison *fourteen years* longer than he would if he had been sentenced in the Sixth or Ninth Circuits. See *Cox* Pet. 10.

This disparate treatment has been incorporated into BOP policies. Currently, if a federal judge in the Fifth, Eighth, Tenth, or Eleventh Circuits orders that a defendant serve his federal sentence consecutive to a future state sentence, the BOP will refuse to accept custody of a state prisoner until his full state sentence has been served, no matter what the state court decides. See BOP Program Statement 5160.05 ¶ 9(b)(4)(f) ("The Bureau will not allow a concurrent designation if the sentencing court has already made a determination regarding the order of service of sentence (e.g., the federal sentencing court ordered the sentence to run consecutively to any other)"); *id.* 5880.28, at 1-32a ("On occasion, a federal court will order the federal sentence to run concurrently with or consecutively to a not yet imposed term of imprisonment. Case law supports a court's discretion to

enter such an order and the federal sentence shall be enforced in the manner prescribed by the court.").[9]

And because federal inmates may be imprisoned outside of the circuit in which they were sentenced, similarly situated inmates even within the same institution may be subject to substantially disparate sentences resulting solely from the courts' conflicting interpretations of 18 U.S.C. 3584(a). Such irrational disparities diminish confidence in the criminal justice system's fairness and integrity among inmates, their families, and the broader community.

2. This Court should also grant certiorari because the split of authority implicates the important sovereign interests of state criminal justice systems.

First, as discussed *infra* at 21-30, the majority view in the circuits erroneously permits federal district courts to invade the sentencing prerogatives of state courts. Properly construed, Section 3584(a) operates to ensure that federal courts do not usurp the authority of a subsequent court, including a state court, to independently evaluate whether its sentence should be served concurrently or consecutively to a prior federal sentence. That authority, however, has been revoked by the interpretations of the courts of four federal circuits.

Second, and relatedly, the majority circuit view substantially interferes with the ability of state prosecutors to negotiate plea bargains they deem to be in the public interest.

---

[9] The circuit split also gives rise to difficult questions of administration when an inmate is subject to both an initial federal sentence and a sentence later imposed by a state or federal court located within the geographic confines of another circuit, possibly one with a different rule. See, *e.g.*, *Cozine* v. *Crabtree*, 15 F. Supp. 2d 997 (D. Or. 1998) (holding that federal sentence imposed within Fifth Circuit cannot be consecutive to sentence later imposed by California because Ninth Circuit rejects Fifth Circuit's reading of Section 3584(a)).

Under the law in these circuits, a state court is rendered powerless to implement an agreement that calls for a state sentence running concurrent with a prior federal sentence. In this case, for example, state prosecutors determined – in light of their view of the evidence and the equities of the case and in accordance with state law enforcement priorities – that rather than incur the cost and risk of a jury trial, they were willing to settle on a plea of no contest to lesser charges and a punishment consisting of a state sentence running concurrent to the prior federal sentence. Had it been clear that the state court would be unable to effectuate that deal, the parties in the state proceeding may well have been prevented from reaching a mutually satisfactory plea bargain, leading to an otherwise unnecessary trial.

3. In its brief in opposition in *Cox*, the government has argued that "[r]esolving [the circuit] conflict is unnecessary," BIO 5-6, because, with sufficient imagination and manipulation, a second sentencing court can circumvent the first court's determination that the sentences should be consecutive even in those circuits that, like the Fifth, hold that Congress intended the first court to have the power to make that sentence consecutive. That argument is flawed in both its premise and its conclusion.

The premise of the argument – that state courts can easily circumvent a prior federal court's order that the state and federal sentences be served consecutively – ignores the many situations in which a state court will be unable, as a matter of state law, to undertake the machinations recommended by the government in *Cox*. For example, the government has suggested that a state court can effectively ensure a concurrent sentence by reducing the state sentence by the amount of the prior federal sentence. See *Cox* BIO 7. But this avenue would be foreclosed in many cases in which the defendant is subject to a mandatory minimum sentence under state law. See, *e.g.*, Pet. for Cert. 11, *Andrews* v. *United States* (No. 03-136) (involving state drug charge carrying a three-year minimum sentence, pursuant to which state court

could not depart downward to circumvent the federal court's order of consecutive sentences). State sentencing guidelines may similarly restrict the ability of state courts to evade a federal court's order by reducing a state sentence.

In any case, even when state law empowers a state court to reduce its sentence in an end-run around a federal court's consecutive sentence designation, implementing the plan would be far from simple. To ensure that a consecutive sentence is equivalent to the concurrent sentence that it would have preferred to impose, the state court cannot merely reduce the state sentence by the length of the federal sentence. Instead, it must also factor myriad considerations – such as good time and earned credits, the nature of the offenses at issue, and discrepancies between the federal and state sentencing schemes – into a complicated calculus to arrive at an equivalent sentence. Moreover, if a state court determines to reduce its sentence to ensure concurrent sentencing, it runs the risk that the federal sentence may be reduced or eliminated altogether in some subsequent proceeding, thereby resulting in a prisoner's serving a shorter sentence than the state had determined to be appropriate.

A related failure of foresight prevented the state court from effectuating its intent in this case. At the time of the state court sentencing, the district court had subjected petitioner to a federal sentence of seventy-eight months without stating whether it intended that sentence to be served concurrently or consecutively to the sentence that might be imposed at some point in the future in the state prosecution. In accordance with the state plea bargain, the state court ordered that the state sentence be served concurrent with the prior federal sentence. At that point, the state court had no reason to believe that it was required to reduce its sentence or engage in any other manipulation in order to ensure that its intent was effectuated.[10] By the time the federal court

---

[10] As noted above, *supra* at 8-9, some circuits have held that unless the district court states otherwise, a federal sentence shall be

clarified its intent that the sentences should be consecutive, it was too late for the state court to reopen its prior judgment in order to thwart the district court's order.

Those state courts willing and able to manipulate their sentencing in the manner suggested by the government also face a real prospect of a battle of wills with the prior federal court and the Bureau of Prisons. Cf. *Cozine* v. *Crabtree*, 15 F. Supp. 2d 997, 1013 (D. Ore. 1998) ("Federal officials' recalcitrance in honoring California concurrent sentences has been a continuing source of conflict for decades * * *."). This battle of wills is exactly what resulted in *Cox*. In that case, the federal court ordered that Cox's federal sentence run consecutive to any subsequent state sentence. State officials, however, had agreed to a plea bargain under which Cox would plead guilty in exchange for a state sentence to be served concurrently with his federal sentence. Because Cox was by that time in state custody awaiting his state sentencing, the state judge was faced with a dilemma. If he ordered a concurrent sentence and kept Cox in a state facility until the state term was served, Cox faced the very real prospect that he would not receive any federal credit for the time served in state prison, thereby thwarting the state court's intent to impose a concurrent sentence. To avoid this, and to effectuate the plea agreement, the state court released Cox on a bond to force federal officials to place him in federal custody, where his time would count toward his federal sentence (and, under the plea agreement, toward Cox's state sentence as well). See Denver County Dist. Ct., Colo., Case No. 2003 CR 2984, Minute Order (Mar. 18, 2005). This jousting between state and federal officials – apparently endorsed by the government as an acceptable substitute for review of the question presented by this Court – is a far cry from the "spirit of reciprocal comity and mutual assistance"

---

consecutive to any future unimposed sentence. The Fifth Circuit has not, however, so held.

that this Court has long advocated. *Ponzi* v. *Fessenden*, 258 U.S. 254, 259 (1922).

All of this, of course, presumes that state courts will believe that manipulating their sentencing to avoid the effect of a prior federal court order is both legal under Section 3584(a) and appropriate as a matter of comity. Many state courts may well view such manipulations as improper in light of circuit precedent declaring it the federal court's prerogative to determine whether the state and federal sentences shall be concurrent or consecutive. Indeed – as the government has never disputed – petitioner has been able to identify only one case in which the later state sentencing court successfully circumvented the designation of a federal sentence as consecutive to an unimposed term of imprisonment. See *Williams*, 46 F.3d at 57 (describing state court's sentencing reduction).

In the end, even if the government were right that in at least some cases a state judge can circumvent a prior federal court's improper sentencing designation, that would be no reason to deny certiorari. The point of Section 3584(a) is to permit a state court to effectuate its intent simply by declaring it. Being required to resort instead to sentencing manipulations (and perhaps even requiring state legislatures to repeal mandatory minimum sentences or amend state sentencing guidelines) in order to exercise a power Congress intended to preserve to the States constitutes an affront to the dignity and sovereignty of the state criminal justice system. That affront should be corrected by this Court in this case.

4. While petitioner has focused on the affront to a state court entering a subsequent judgment, the same problem arises when the second sentencing court is another federal district court. In that circumstance, the government has yet to offer an explanation of what the second district court could do to implement its determination that its sentence should run concurrent with the first. If the two courts are in the same circuit, the government cannot seriously contend that the

second court would be permitted, under circuit precedent, to thwart the first court's determination. In any case, as is true in the state courts, the ability of a subsequent federal district court to implement a strategy of circumvention would often be limited by mandatory minimums and federal sentencing guidelines.

5. Finally, it bears noting that for whatever reason, the government's suggested circumventions have not, in fact, been employed by state and district courts. As a result, the circuit split has, in fact, created persistent disparate sentences for similarly situated defendants across the nation. The government's hypothetical stratagems have not cured these disparities thus far and there is no reason to think that they will in the future. Intervention by this Court is required.

III. This Case Presents An Ideal Vehicle For Resolving The Circuit Split.

The only other ground the government has given for denying the petition for certiorari in *Cox* is its assertion that the particular circumstances of that case make it a poor vehicle for deciding the question presented. See *Cox* BIO 8-9. That argument lacks merit for the reasons given in the reply brief in support of certiorari in *Cox*, but in any event this case presents the question in an ideal posture.

The question presented in this petition was raised in, and decided by, the court of appeals. Pet. App. 2a-3a. In the Fifth Circuit, the government did not contest that the issue was preserved in the district court and properly subject to decision on appeal. See Resp. C.A. Br. 10. And the sole ground on which the court of appeals relied in rejecting petitioner's Section 3584(a) claim was that it was precluded by the prior circuit precedent that the government acknowledges is in conflict with the decisions of other courts. See Pet. App. 2a-3a (disposing of claim on the authority of *United States* v. *Brown*, 920 F.2d 1212, 1217 (CA5 1991)); *Cox* BIO 5 (citing *Brown* as part of circuit split). Moreover, petitioner would

unquestionably benefit from a ruling in his favor, as the Bureau of Prisons postponed his release date based solely on its conclusion that the district court validly ordered that the state and federal sentences be served consecutively. *Id.* 2a-3a.

Nor does this case present any of the vehicle problems on which the government has relied in opposing certiorari on this issue in prior cases.[11] In *Andrews* v. *United States*, No. 03-136, for example, the government argued that the case was an inappropriate vehicle because no court had expressed the desire to have its sentence run concurrently. *Andrews* BIO 10. In this case, however, the state court's intent to impose a concurrent sentence has been made clearly and repeatedly. See *supra* at 3-4.[12]

The other objection the government raised to the petitions in *Cox* and *Andrews* was that the state court had not yet issued its sentence in *Cox* and had already issued its decision in *Andrews*. That is, in *Cox*, the government has objected that because the state court has not yet imposed its sentence "it is at best unclear how the state and federal sentences will interact," rendering petitioner's claim of harm "speculative." *Cox* BIO 9. That objection, of course, has no relevance here; both state and federal sentences have been imposed and it is clear that absent review by this Court, the state court's intention to impose a concurrent sentence will be overridden.

---

[11] This Court has denied certiorari on the question presented in three prior cases, all of which presented poor vehicles, as the government explained in its oppositions to certiorari. See *Lackey* v. *United States*, 125 S. Ct. 2964 (2005) (No. 04-9286); *Martinez* v. *United States*, 125 S. Ct. 1299 (No. 04-7129); *Andrews* v. *United States*, 540 U.S. 1003 (2003) (No. 03-136).

[12] The Court denied certiorari in *Lackey* v. *United States*, No. 04-9286, after the government pointed out and the petitioner conceded that he had failed to preserve his objection in the lower court. In this case, petitioner clearly raised and preserved his argument that the district court lacked the authority to impose a consecutive sentence.

But the government argued in *Andrews* that a case in which both courts have issued their sentences is equally objectionable. This is so, the government asserted, because even if the defendant prevailed in this Court, there could be no remedy because on remand the federal court would become the second sentencing court, entitled to make its sentence consecutive to the now-prior state sentence. See *Andrews* BIO 14.

Thus, the government's position appears to be that a case is a bad vehicle if the state court has not yet issued its sentence, and an even worse one if it has. There can be little doubt, in light of this position, that the government has not been attempting to direct this Court to an appropriate vehicle to decide the question presented, but rather attempting to prevent this Court from ever deciding the question at all.

In any case, even if taken at face value, the objection to taking a case in which the issue is actually presented and of consequence – that is, a case in which a district court's order has, in fact, thwarted the intent of a subsequent state court to make its sentence concurrent – is meritless. The upshot of the government's argument – that even if a district court's sentencing order is illegal, there can never be a remedy – is strong reason to believe that the argument is wrong. Indeed, this Court's power to remedy the erroneous decisions of the lower courts is not so limited as the government briefs in *Andrews* and again *Cox* presume. See 28 U.S.C. 2106 (on appellate review, Supreme Court may "require such further proceedings to be had as may be just under the circumstances"). Among other things, the illegal portion of the sentence ordering that the subsequent state sentence be served consecutively may simply be declared ineffective, as would a court's unauthorized attempt to designate the facility in which an inmate is to be held. Cf. *United States* v. *Dragna*, 746 F.2d 457, 458 (CA9 1984) (where district court lacked authority to change sentence to designate inmate's place of confinement, original sentence without designation ordered reinstated), cert. denied, 469 U.S. 1211 (1985); see

also *State* v. *Blevins*, 394 N.W.2d 663, 664 (Neb. 1986) (modifying Nebraska court's sentence to strike from the sentencing order, as surplusage, the language, 'Said sentence shall be served consecutive to any sentence received by the defendant in Colorado'").

Such a course would be particularly appropriate in this case. In *Cox*, the government suggested that a remand for resentencing would be required to allow the district court to reconsider its prior decision that petitioner's Hobbs Act and gun possession sentences should run concurrently. *Cox* BIO 9-10 n.5. In this case, petitioner was convicted on a single count of conspiracy in violation of 21 U.S.C. 846. The only purpose that would be served by vacating the entire sentence would be to permit the district court a chance to attempt to re-impose the very consecutive sentence that this Court would have determined was illegal when entered. Nothing in the law requires that result or prevents this Court from reviewing this important question in this case.

IV. The Decision Below Is Erroneous.

1. As the Sixth and Ninth Circuits have recognized, Section 3584(a) has a simple structure. It is composed of three sentences. The first sentence enumerates the two specific situations in which a federal district court can control whether sentences are served concurrently or consecutively: first, when the sentencing court is imposing *both* sentences – that is, when it "imposes multiple terms of imprisonment on the defendant at the same time"; and second, when the sentencing court is imposing a sentence on a defendant who has already been sentenced by another court – that is, when the court "imposes a sentence on a defendant who is '*already subject* to an undischarged term of imprisonment.'" *Quintero*, 157 F.3d at 1040 (emphasis supplied by court). The final two sentences of the statute establish the default rules for each of these two situations. The penultimate sentence of the statute deals with the first situation – when the sentencing court itself is imposing all the sentences. When the sentencing court is

imposing all the sentences, the terms are to run concurrently unless the court specifies otherwise. The last sentence of the statute deals with the second situation – when the sentencing court is sentencing a defendant who has already been sentenced elsewhere. In this situation, the sentences are to run consecutively unless the second sentencing court specifies otherwise.

Nothing in the text of Section 3584(a) gives any power to a federal district court to control the relationship between a sentence it imposes and sentences by other courts that have not yet been imposed. As the Sixth Circuit explained in *Quintero*, 157 F.3d at 1040, "[t]he opening sentence of § 3584(a) establishes [when] this statute applies * * *. The presumptions established by the last two sentences of § 3584(a) must be read in light of this limiting language at the beginning of the section." And in particular, and contrary to the circuits adopting the majority position, nothing in the text of the statute provides any indication that it was intended to bind state court judges in subsequent proceedings. See *Luther* v. *Vanyur*, 14 F. Supp. 2d 773, 776 (E.D.N.C. 1997) ("Conspicuously absent is any discussion of the effect of the statute where there is a subsequent state sentence. This is not surprising. The statute directs the actions of federal officials, not the actions of state officials."); see also *Clayton*, 927 F.2d at 493 ("Based upon * * * the limited authority conferred by section 3584(a) * * * we hold that a federal district court does not have the authority to direct that a federal sentence be served consecutive to a state sentence not yet imposed."); *United States* v. *Smith*, 101 F. Supp. 2d 332, 343 (W.D. Pa. 2000) ("By [its] plain terms, [Section 3584(a)] appl[ies] where a defendant is already subject to a prior undischarged term of imprisonment, and do[es] not appear to embrace the situation where a defendant is simply incarcerated in a state facility while awaiting trial on state charges."). Even the Fifth Circuit, which applies the contrary rule, conceded that the Sixth and Ninth Circuits' reading is supported by the text's "plain language." *Hernandez*, 234 F.3d at 256.

Some of the circuits that have adopted the contrary rule read the final sentence of Section 3584(a) – providing that "[m]ultiple terms of imprisonment imposed at different times run consecutively unless the court orders that the terms are to run concurrently" – as if it were freestanding. But that reading actually supports the rule adopted by the Sixth and Ninth Circuits. If the final sentence is untethered from the prior sentences, which make clear that Section 3584(a) addresses two, and only two, situations – namely, when the sentencing court is imposing the relevant sentences simultaneously and when the sentencing court is imposing the relevant sentence on a defendant already sentenced in a prior proceeding – then the circuits taking the majority position have offered no reason why a judge imposing a subsequent sentence cannot simply override the first sentencing judge's directive. After all, that judge, too, can "orde[r] that the terms are to run concurrently."

2. The Sixth and Ninth Circuit's view not only better accords with the plain language of Section 3584(a), but also avoids rendering any of its language superfluous. This Court has repeatedly directed that courts should construe statutes so that "if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *Duncan* v. *Walker*, 533 U.S. 167, 174 (2001) (quoting *Market Co.* v. *Hoffman*, 101 U.S. 112, 115 (1879)). If the last sentence of the statute were an independent grant of authority to impose consecutive sentences in all cases in which two sentences are imposed at different times, then the first sentence would serve no purpose – it would be subsumed by the last. James J. Sample, Note, *The Sentences That Bind (The States)*, 103 COLUM. L. REV. 969, 984 (2003). In particular, it would render the "already subject to" language of the first sentence mere surplusage.

3. The majority position also violates canons of statutory construction designed to serve a variety of important constitutional concerns.

First, this Court has held that courts should avoid construing statutes in ways that raise serious federalism concerns. See, *e.g.*, *Gregory* v. *Ashcroft*, 501 U.S. 452, 460 (1991). Perhaps no aspect of states' power is more central to their role than enforcement of their criminal statutes. See, *e.g.*, *Pennsylvania Dep't of Corr.* v. *Yeskey*, 524 U.S. 206, 209 (1998) ("One of the primary functions of government * * * is the preservation of societal order through enforcement of the criminal law * * *.") (citations omitted). As already explained, the Fifth Circuit's interpretation permits federal courts to trench wholesale on a state court's judgment regarding how its criminal sentences should be served. It allows federal district courts universal latitude to override a state's considered judgment. Indeed, the order issued in this case requires that petitioner's federal sentence run consecutively to *any* state-court sentence imposed at *any* time in the future, even for crimes for which petitioner has not yet been charged or convicted – indeed, even for crimes that have not yet been committed. This is a breathtaking assertion of federal power. It places states that wish to impose concurrent sentences with the Hobson's choice of either acquiescing to a federal court's desire that all sentences run consecutively or forgoing sentencing a defendant at all. By contrast, the interpretation adopted by the Sixth and Ninth Circuits confines a federal court's authority to override a state's judgment to a narrower category of cases in which there are reasons to think the federal court has superior information – namely, cases in which the federal court acts subsequent to the state court.

Second, this Court has repeatedly held that statutes should be construed to avoid constitutional problems. See, *e.g.*, *McConnell* v. *Federal Election Comm'n*, 540 U.S. 93, 180 (2003). Even the courts that permit federal district courts to control the execution of after-imposed sentences acknowledge that their rule gives rise to significant separation-of-powers and comity concerns. See *Mayotte*, 249 F.3d at 799. Under their reading, a federal sentence imposed while state charges

are pending is presumed to run consecutively to any later-imposed state sentence. Even if a subsequent state court decision orders that the sentence it imposes run concurrently and the prisoner is in state custody at the time of his state sentencing, effective control over service of the sentences passes to the federal BOP, because it has the power to decide whether to accept custody over the prisoner and therefore whether he will receive credit for service of his federal sentence.[13] The BOP is, of course, part of the executive branch, which also controls the prosecutorial function. Thus, the majority interpretation of Section 3584(a), by conferring the power to determine concurrency in the BOP, rather than in the courts, runs afoul of separation-of-powers principles.[14] See *Abdul-Malik*, 403 F.3d at 76; see also *Cozine*, 15 F. Supp. 2d at 1004 (recognizing possibility that "low-level prison officials can effectively override the decisions of the state and

---

[13] Because a defendant already in state custody will begin serving the state sentence in a state prison first, the BOP has the discretion either to designate the state prison as the place of federal confinement or to refuse to start the clock on the defendant's federal sentence until the state sentence is fully served. See, *e.g.*, *Brown* v. *Ashcroft*, 41 Fed. Appx. 873, 874-75 (CA7 June 21, 2002) (unpublished) (noting BOP's sole discretion to make sentences run concurrently when federal court was silent and state court ordered concurrent sentences); see also *Barden*, 921 F.2d at 482-83 (same).

[14] To the extent that the separation of powers concerns voiced by the Second Circuit arise from the exercise of discretion on the part of the Attorney General, petitioner notes that such discretion is not supported by either the statute or its legislative history. Although the Attorney General has "wide discretion in choosing the place of a prisoner's confinement," *Barden*, 921 F.2d at 481, and – as this Court has found – the Attorney General has the responsibility for determining "sentencing credit," *United States* v. *Wilson*, 503 U.S. 329, 334 (1992), this is very different from granting the Attorney General the discretion whether to run an entire federal sentence consecutively to or concurrently with another sentence. See *supra* at 9.

federal sentencing courts"); see also *Griffin* v. *Pennsylvania Dep't of Corr.*, 862 A.2d 152, 158 n.7 (Pa. Commw. Ct. 2004) (describing as "troubl[ing]" the possibility that "administrative officials in certain instances, just by deciding whether an inmate is to serve federal or state time first, can determine whether an individual is to serve many years more in prison than the sentencing judges envisioned").

Particularly alarming is the prospect, which the Seventh Circuit's interpretation permits, that the BOP may impose a de facto sentence longer than either sentencing court had intended. See *Abdul-Malik*, 403 F.3d at 75. Under the Seventh Circuit rule, the first sentencing judge has no authority to order a sentence to run concurrently or consecutively, and only the BOP has discretion, regardless of what the judge may declare. *Romandine*, 206 F.3d at 737-38.[15] Because the interpretation of Section 3584(a) adopted by the Sixth and Ninth Circuits mitigates the separation-of-powers concerns inherent to the majority rule and exacerbated by the Seventh Circuit's rule, such a construction is preferable. *McConnell*, 540 U.S. at 180.

Third, the majority position ignores the rule of lenity. "'When there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language.'" *Scheidler* v. *Nat'l Org. Women*, 537 U.S. 393, 409 (2003) (quoting *McNally* v. *United States*, 483 U.S. 350, 359-60 (1987)). See also, *e.g.*, Sample, *supra*, at 985-86. Thus, even if both the majority construction of the statute – viz., permitting federal district courts to control the execution of

---

[15] To be sure, as noted above, *supra* at 9, the BOP itself declines the broad discretion accorded to it by the Seventh Circuit and will act in accordance with the intent of a federal judge. Nevertheless, given the Seventh Circuit rule, one would imagine that district courts will simply remain silent, thus triggering the BOP's discretion. Furthermore, the BOP may change its policy at any time.

subsequently imposed sentences – and the approach of the Sixth and Ninth Circuits – viz., prohibiting federal courts from exercising such control – were plausible, the latter approach should prevail.

3. A construction which infers that Congress intended to permit district courts to prohibit later courts from imposing a consecutive sentence also defies "common sense."[16] *McCarthy*, 146 F.3d at 122. In the case of an unimposed sentence, only the later sentencing court will know the total length of a consecutive term of imprisonment. Similarly, only the later sentencing court will be aware of a variety of factors – such as cooperation with the authorities or the relationship between the offenses underlying the two sentences – that may develop after the imposition of the first sentence and that might justify concurrent service. Thus, the later sentencing

---

[16] This is only confirmed by the fact that in the overwhelming majority of states, state courts cannot bind subsequent courts in connection with non-existent sentences. See, *e.g.*, *People* v. *Lister*, 202 Cal. Rptr. 37, 38 (Ct. App. 1984) (holding that a California court "had no power to impose sentence consecutive to a federal sentence which had not yet been pronounced"); *People* v. *Flower*, 644 P.2d 64, 66 (Colo. Ct. App. 1981) ("a trial court may not require a sentence otherwise properly imposed to be served consecutively to some other sentence not yet imposed in another pending case."); *Oquendo* v. *Quinones*, 738 N.Y.S.2d 398, 400 (N.Y. App. Div. 2002) (construing a New York statute to bar a state court from ordering a sentence to run concurrently with a subsequent federal sentence); *State* v. *Alexander*, 162 Ohio App. 3d 333, 335 (2005) ("when a trial court imposes a sentence and orders it to be served consecutively with any future sentence to be imposed, * * * such a sentence interferes with the discretion granted the second trial judge to fashion an appropriate sentence or sentences") (quoting *State* v. *White*, 41 N.E.2d 596 (Ohio 1985)); C.J.S. *CRIMLAW* § 1524 (2005) (stating that the general rule is that "[t]he decision as to whether sentences imposed at different times shall run consecutively or concurrently should be made by the last judge imposing sentence" and citing no state exceptions).

court is in the best position to decide what sentence would be appropriate and just. As Judge Newman has explained, "[i]mposition of a consecutive sentence is strong medicine" that "should be used only after awareness of a sentence already imposed so that the punitive effect of the consecutive sentence is carefully considered at the time of its imposition. * * * The length of a primary sentence is always relevant to a reasoned decision concerning both the length of a consecutive sentence and the choice of imposing it consecutively." *Salley*, 786 F.2d at 548 (Newman, J., concurring in the result); see also *Smith*, 101 F. Supp. 2d at 343 (explaining that petitioner's interpretation of Section 3584(a) "makes eminent sense, because there is no way to tell whether a pending state charge is going to result in acquittal, conviction, guilty plea, * * * or some other disposition, or what the state sentence will be * * *, and attempting to achieve a just and fair total time of confinement * * * by sequential reference to a non-existing state sentence is certainly problematic, to say the least"). Imposing a sentence consecutive to an unimposed term also allows the "second judge [to] extend the expiration date of the first judge's sentence." *Salley*, 786 F.2d at 548 (Newman, J., concurring in the result); see also *Clayton*, 921 F.2d at 493 (finding that federal sentence directed to run consecutively to unimposed state sentence "infringes upon the rights of the defendant" because it prejudices the defendant's "right to have a state court consider whether a state sentence should run concurrently with his federal sentence") (internal quotations omitted).

5. If additional guidance beyond the plain language and canons of construction were required to construe Section 3584(a), then the legislative history of the statute also indicates that the Fifth Circuit erred. The legislative history – both through what it says *and* through its silence with regard to unimposed state sentences – confirms petitioner's reading of the statute. As the Second Circuit has recognized, the legislative history indicates that the "drafters of § 3584(a) were concerned with the imposition of a federal sentence on a

defendant *already* serving either a state sentence or another federal sentence." *McCarthy*, 146 F.3d at 122 (quoting S. Rep. No. 98-225, at 126 (1983)) (emphasis added). According to the Senate Report: "[Section 3584(a)] provides that sentences to multiple terms of imprisonment may * * * be imposed to be served either concurrently or consecutively, whether they are imposed at the same time or one term of imprisonment is imposed *while the defendant is serving another one*." *Id.* (emphasis added). The statute thus "changes the law that now applies to a person sentenced for a Federal offense *who is already serving a term of imprisonment for a State offense*." S. Rep. No. 98-225 at 126 (1983), reprinted in 1984 U.S.C.C.A.N 3182, 3309 (emphasis added). Tellingly, the discussions of consecutive sentences in the Senate Report do not mention unimposed state sentences. These discussions refer variously to "a term of imprisonment imposed on a person *already serving* a prison term," to sentences "imposed while the defendant *is serving* another one," and, as noted above, to "a person sentenced for a Federal offense who is *already serving* a term of imprisonment for a State offense." *Id.* at 126-27 (emphases added). That these discussions do not refer to unimposed state sentences, but instead frequently refer to sentences already being served, strongly suggests that the Sixth and Ninth Circuits' construction of Section 3584(a) best captures Congress's intent.

The Senate Report also specifically disapproved the holding of *United States* v. *Segal*, 549 F.2d 1293 (CA9 1977). See S. Rep. No. 98-225 at 127 n.435. In *Segal*, the Ninth Circuit had held that a federal court could not impose a sentence that would run concurrently to an *already imposed* state sentence. 549 F.2d at 1301. Section 3584(a) was thus enacted to give federal courts the power to impose a sentence concurrent with an already imposed state sentence. It is therefore contrary to the legislative history of the statute and a violation of the principle of comity to construe Section 3584(a) to mean that Congress simultaneously granted federal

courts the power to impose concurrent sentences relative to already imposed state sentences and interfered with the power of state courts to do exactly the same thing. Cf. *Younger* v. *Harris*, 401 U.S. 37, 44 (1971) ("["Our Federalism" represents] a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States."). Not surprisingly, the circuits adopting the more expansive reading of the statute ignore this history.

Thus, the legislative history indicates that Congress intended precisely what the plain meaning of the statute states. Congress certainly did not intend to strip state courts of the power to order concurrent sentences, much less implement a broad delegation of quasi-judicial authority to the BOP.[17]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted or, in the alternative, granted together with the petition in No. 05-454, *Cox* v. *United States*.

Respectfully submitted,

---

[17] To the contrary, because the predecessor statutes precluded federal courts from ordering a consecutive or concurrent sentence, authority to determine whether a sentence should be served consecutively or concurrently to an *already* imposed sentence rested with the BOP. *United States* v. *Fuentes*, 107 F.3d 1515, 1519 n.6 (CA11 1997); *Cozine*, 15 F. Supp. 2d at 1004 n.2; see also S. Rep. No. 98-225, at 129. Thus, the enactment of Sections 3584(a) and 3585(a) served to limit the discretion of the BOP in connection with concurrent or consecutive sentences.

Pamela S. Karlan
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

Thomas C. Goldstein
Amy Howe
Kevin K. Russell
(Counsel of Record)
GOLDSTEIN & HOWE, P.C.
4607 Asbury Pl., NW
Washington, DC 20016
(202) 237-7543

December 23, 2005

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 04-10987 Summary Calendar

DOUGLAS EDWIN PIERCE,
Petitioner-Appellant,

v.

L E FLEMING, Warden,
Federal Medical Center Fort Worth,
Respondent-Appellee.

October 14, 2005, Filed

Appeal from the United States District Court for the Northern District of Texas, USDC No. 4:04-CV-357-A.

For DOUGLAS EDWIN PIERCE, Petitioner - Appellant, Pro se, Federal Medical Center, Fort Worth, TX.

For L E FLEMING, Warden, Federal Medical Center Fort Worth, Respondent - Appellee: Tami C Parker, US Attorney's Office, Northern District of Texas, Fort Worth, TX.

Before KING, Chief Judge, and SMITH and GARZA, Circuit Judges.

PER CURIAM:*

---

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Douglas Edwin Pierce, federal prisoner #03473-180, appeals the district court's denial of his 28 U.S.C. § 2241 petition, in which he contended that the Bureau of Prisons (BOP) incorrectly calculated his federal sentence.

Pierce contends that the district court erred when it concluded that some of his claims were unexhausted. He also argues that the district court erred when it determined that his federal sentence was to run consecutively to a subsequently imposed state sentence and that the district court erred when it determined that the BOP properly credited his sentence for time served.

Pierce argues that the BOP's method of calculating his sentence resulted in prejudice, because a state sentence for various state offenses, imposed after his federal conviction, was calculated in a manner that was inconsistent with the assumptions set forth in the BOP's calculation of his federal sentence. Pierce argues that, based on the BOP's calculation of his sentence, the state failed to credit him for the correct amount of time and his release from state prison was delayed. The record does not indicate that these issues were raised in the administrative proceedings. Therefore, the district court did not abuse its discretion when it determined that Pierce failed to exhaust administrative remedies with respect to these issues. See *Fuller v. Rich*, 11 F.3d 61, 62 (5th Cir. 1994).

Pierce argues that his federal sentence should have included the time that he was held in federal prison pursuant to a writ of habeas corpus ad prosequendum because his federal sentence should have been treated by the BOP as a concurrent sentence. The sentencing court had the discretion to order that a federal term of imprisonment run either consecutively to or concurrently with an anticipated, but not yet imposed, state sentence. *United States v. Brown*, 920 F.2d 1212, 1217 (5th Cir. 1991); 18 U.S.C. § 3584(a). The respondent submitted unrefuted evidence with its summary judgment motion that indicated that the federal sentencing court intended for the sentence to run consecutively to his

state sentence. The district court therefore did not commit error when it concluded that the BOP properly treated Pierce's federal sentence as a sentence that was to run consecutively to his state sentence.

Additionally, the fact that the state court ordered the state sentence to run concurrently with the federal sentence does not change the consecutive nature of the federal sentence. Federal authorities are not bound by sentencing orders from state courts. *See Leal v. Tombone*, 341 F.3d 427, 429 n.13 (5th Cir. 2003). Finally, because the record indicates that the time that Pierce spent in federal custody pursuant to a writ of habeas corpus ad prosequendum was credited against his state sentence, the BOP correctly applied 18 U.S.C. § 3585(b)(2) when it did not include this time as a credit towards Pierce's federal sentence. *See Vignera v. Attorney General of the United States*, 455 F.2d 637, 637-38 (5th Cir. 1972).

For the foregoing reasons, the judgment of the district court is AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

No. 4:04-CV-357-A

DOUGLAS EDWIN PIERCE,
Petitioner,
Vs.
L.E. FLEMING, WARDEN, FMC-FORT WORTH,
Respondent.

Filed July 23, 2004

ORDER

Came on consideration the petition of Douglas Edwin Pierce pursuant to 28 U.S.C. § 2241 for writ of habeas corpus. The court, having considered the motion, the response, petitioner's traverse and respondent's reply thereto, the record, and applicable authorities, finds that the petition should be denied.

Petitioner alleges that he has not received proper credit for time spent in state custody prior to federal custody. He alleges that he is entitled to an additional 652 days' credit. For the reasons discussed in the response[1] and reply to petitioner's traverse, the petition is without merit. The record reflects that petitioner has received proper credit for time served. As respondent notes, the grounds raised in petitioner's traverse were not raised during the administrative process and cannot be raised now. Moreover, and in any

[1] In response to the petition, respondent filed both a motion for summary judgment and a motion to dismiss. The discussion to which the court refers is contained in respondent's motion to dismiss, with memorandum brief.

event, the allegation that petitioner did not receive credit in the state system for time served is belied by the record. Therefore,

The court ORDERS that the petition in this action be, and is hereby, denied.

SIGNED July 23, 2004.

_____/s/_____
JOHN McBRYDE
United States District Judge

(3)

Supreme Court, U.S.
FILED
APR 7 - 2006
OFFICE OF THE CLERK

No. 05-826

In the Supreme Court of the United States

DOUGLAS EDWIN PIERCE, PETITIONER

v.

COLE JETER, WARDEN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record

ALICE S. FISHER
Assistant Attorney General

LOUIS M. FISCHER
Attorney

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the court of appeals erred in refusing to set aside the determination by the Bureau of Prisons that petitioner was not entitled to credit against his federal sentence for time he spent in state custody, where credit for that time had been awarded by the State against petitioner's state sentence.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 1
Argument 9
Conclusion 16

TABLE OF AUTHORITIES

Cases:

Abdul-Malik v. *Hawk-Sawyer*, 403 F.3d 72 (2d Cir. 2005) 12
Andrews v. *United States*, 540 U.S. 1003 (2003) 10
Barden v. *Keohane*, 921 F.2d 476 (3d Cir. 1990) 12
Covell v. *Heyman*, 111 U.S. 176 (1884) 13
Cox v. *United States*, 125 F. App'x 973 (10th Cir.), petition for cert. pending, No. 05-454 (filed Oct. 5, 2005) 10
Cruz v. *United States*, 153 F. App'x 587 (11th Cir. 2005), petition for cert. pending, No. 05-8866 (filed Jan. 10, 2006) 10
Jake v. *Herschberger*, 173 F.3d 1059 (7th Cir. 1999) 13
Lackey v. *United States*, 125 S. Ct. 2963 (2005) 10
Martinez v. *United States*, 125 S. Ct. 1299 (2005) 10
Ponzi v. *Fessenden*, 258 U.S. 254 (1922) 13
Romandine v. *United States*, 206 F.3d 731 (7th Cir. 2000) 9, 12
Strand v. *Schmittroth*, 251 F.2d 590 (9th Cir.), cert. dismissed, 355 U.S. 886 (1957)), cert. denied, 537 U.S. 1119 (2003) 13

Cases—Continued: Page

Taylor v. *Sawyer*, 284 F.3d 1143 (9th Cir. 2002), cert. denied, 537 U.S. 1119 (2003) 12, 13
United States v. *Andrews*, 330 F.3d 1305 (11th Cir.), cert. denied, 540 U.S. 1003 (2003) 9
United States v. *Brown*, 920 F.2d 1212 (5th Cir.), cert. denied, 500 U.S. 925 (1991) 8
United States v. *Clayton*, 927 F.2d 491(9th Cir. 1991) 9
United States v. *Gonzalez*, 520 U.S. 1 (1997) 13
United States v. *Mayotte*, 249 F.3d 797 (8th Cir. 2001) 9
United States v. *Penna*, 319 F.3d 509 (9th Cir. 2003) 11
United States v. *Quintero*, 157 F.3d 1038 (6th Cir. 1998) 9
United States v. *Williams*, 46 F.3d 57 (10th Cir.), cert. denied, 516 U.S. 826 (1995) 9
United States v. *Wilson*, 503 U.S. 329 (1992) 10, 11

Statutes and rule:

18 U.S.C. 924(c)(1) 13
18 U.S.C. 1384 10
18 U.S.C. 3584 12
18 U.S.C. 3584(a) 7, 8, 9, 10
18 U.S.C. 3585 ..... 3, 10, 11
18 U.S.C. 3585(b) 3, 5, 7, 8
18 U.S.C. 3621 10
18 U.S.C. 3621(a) 11
18 U.S.C. 3621(b) 6, 11, 12
21 U.S.C. 841(a)(1) 2

Statutes and rule—Continued: Page

21 U.S.C. 846 2
28 U.S.C. 2241 1
Fed. R. Crim. P. 35(a) 11

Miscellaneous:

Federal Bureau of Prisons, U.S. Dep't of Justice:
Program Statement No. 5160.05 (2003) 4, 6, 13, 14
Program Statement No. 5880.28, Sentence Computation Manual CCCA (1999) 3, 14

In the Supreme Court of the United States

No. 05-826

DOUGLAS EDWIN PIERCE, PETITIONER

v.

COLE JETER, WARDEN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is not published in the Federal Reporter but is reprinted in 150 F. App'x 344. The order of the district court (Pet. App. 4a-5a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 14, 2005. The petition for a writ of certiorari was filed on December 23, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In 2004, petitioner filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. 2241, arguing that the Bureau of Prisons (BOP) had erroneously failed to

grant him credit for time spent in state custody. Gov't C.A. Br. 2. The district court denied his petition, Pet. App. 4a-5a, and the court of appeals affirmed, *id.* at 1a-3a.

1. On January 25, 2000, petitioner was arrested on state charges for engaging in organized crime and conspiring to manufacture methamphetamine. Sixteen days later, he was released on bail. On April 8, 2000, state authorities arrested him for bail jumping and failure to appear, and his bond was revoked. On January 17, 2001, while still awaiting prosecution on the state charges, petitioner was transferred into federal custody, on the basis of a writ of habeas corpus ad prosequendum, pending his trial on federal drug charges. App., *infra*, 2a; Gov't C.A. Br. 4.

Petitioner eventually pleaded guilty in the United States District Court for the Western District of Texas to conspiring to manufacture methamphetamine, in violation of 21 U.S.C. 841(a)(1) and 846. On January 3, 2002, the federal district court sentenced him to 78 months of imprisonment, to be followed by five years of supervised release. App., *infra*, 2a-3a; Gov't C.A. Br. 4-5. The federal judgment and commitment order was silent on the relationship between the federal sentence and any future state sentence. App., *infra*, 15a; Pet. 2.

On February 13, 2002, petitioner was returned to state officials. In state court, petitioner pleaded guilty to bail jumping, and the State dismissed the drug charges against him. Pet. 2-3; Gov't C.A. Br. 4-5. On February 21, 2002, the state court sentenced petitioner to three years of imprisonment, to be served concur-

rently with his federal sentence. App., *infra*, 3a; Gov't C.A. Br. 5; Pet. C.A. Br. Exh. H (state judgment).[1]

2. On June 28, 2002, petitioner was paroled from his state sentence directly to the U.S. Marshals Service for commencement of his federal sentence. Pursuant to 18 U.S.C. 3585(b) and BOP *Program Statement 5880.28, Sentence Computation Manual CCCA*, BOP credited petitioner with 33 days that he was in state custody before his federal sentencing because those days had not otherwise been credited against another sentence.[2] BOP did not credit petitioner for any of the other time

---

[1] The state court judgment notes that the terms of the plea agreement include that "[s]entence to run concurrent with any federal sentence, *as applicable*." Pet. C.A. Br. Ex. H, at 2 (emphasis added). The judgment similarly states that the sentence shall be concurrent "if applicable" in its description of the terms of the punishment, *id.* at 3, although in the concluding paragraph it states simply that "Sentence to run concurrent with federal sentence," *ibid.*

[2] Section 3585 provides:

Calculation of a term of imprisonment

(a) COMMENCEMENT OF SENTENCE.—A sentence to a term of imprisonment commences on the date the defendant is received in custody awaiting transportation to, or arrives voluntarily to commence service of sentence at, the official detention facility at which the sentence is to be served.

(b) CREDIT FOR PRIOR CUSTODY.—A defendant shall be given credit toward the service of a term of imprisonment for any time he has spent in official detention prior to the date the sentence commences—

(1) as a result of the offense for which the sentence was imposed; or

(2) as a result of any other charge for which the defendant was arrested after the commission of the offense for which the sentence was imposed;

that has not been credited against another sentence.

he served on his state sentence. App., *infra*, 2a-4a; Gov't C.A. Br. 5.

On October 3, 2002, as part of its process to determine how much credit to afford petitioner for his time in state custody, BOP contacted the Texas Department of Criminal Justice to determine the amount of credit petitioner received on his state sentence. See App., *infra*, 3a-4a, 10a-11a. On October 7, 2002, BOP received information from the State indicating that petitioner received credit on his state sentence from April 24, 2000, until his parole to federal authorities on June 28, 2002. See *id.* at 12a-13a. On May 29, 2003, BOP also contacted the Probation Office in the Western District of Texas to seek the views of the federal sentencing court with respect to the operation of petitioner's federal sentence in relation to his state sentence. See *id.* at 3a, 14a-17a.[3] By letter dated June 20, 2003, the Probation Office informed BOP that "[t]he Court

---

[3] Under BOP *Program Statement 5160.05*, "[a] designation for concurrent service of sentence will be made only when it is consistent with the intent of the federal sentencing court or the goals of the criminal justice system." Federal Bureau of Prisons, U.S. Dep't of Justice, *Program Statement No. 5160.05*, at 4 (2003). The Program Statement further provides that information that the BOP will consider in making that determination includes the "intent of the federal sentencing court, if available." *Ibid.* When an inmate makes a request for pre-sentence credit toward a federal sentence for time spent in service of a state sentence, the Program Statement provides that "[i]n making the determination, if a designation for concurrent service may be appropriate (e.g., the federal sentence is imposed first and there is no order or recommendation regarding the service of the sentence in relationship to the yet to be imposed state term), the [BOP] will send a letter to the sentencing court (either the Chambers of the Judge, U.S. Attorney's Office, and/or U.S. Probation Office, as appropriate) inquiring whether the court has any objections." *Id.* at 6.

wishes this inmate's sentence to run consecutive to his State sentence." *Id.* at 18a.

3. a. Beginning on June 28, 2003, petitioner challenged, through BOP's administrative review process, BOP's decision not to credit him with 652 days that he spent in state custody. See App., *infra*, 20a-28a; Pet. C.A. Br. Exh. D. He contended that he was entitled to the credit because his state judgment provided that his state sentence was to run concurrently to his federal sentence. See App., *infra*, 20a, 24a. Petitioner's appeal was denied at each level, including by the Regional Director. See *id.* at 26a-28a.

On November 14, 2003, the Regional Director explained in his decision that Section 3585(b) "authorizes credit for time spent in official detention prior to the imposition of a sentence that has not been credited against another sentence." App., *infra*, 27a. The Regional Director informed petitioner that "[a]s a result of language on your state judgment reflecting the sentence should be served concurrently with your federal sentence, institution staff contacted the U.S. Probation Officer," who contacted the sentencing judge and were "informed the court intended for your federal sentence to be served consecutively to your state sentence." *Id.* at 27a-28a. The Regional Director further noted that the State had confirmed to BOP that petitioner had received credit from the State for the time for which he sought credit. *Id.* at 27a. As such, the Regional Director explained that to award credit would be "contrary to the intent" of Section 3585(b). *Ibid.*

Nevertheless, the Regional Director indicated that BOP had considered petitioner's request as one to have BOP designate, nunc pro tunc, his state custody as the place of service of his federal sentence. App., *infra*,

27a-28a. After consideration of "the available information, consistent with Title 18 U.S.C. § 3621" and the guidance of BOP *Program Statement 5160.05*, the Regional Director stated that BOP had concluded: "In your specific case, we find commencement of your federal sentence by way of a concurrent designation is not consistent with the goals of the criminal justice system." *Id.* at 28a.[4]

In December 2003, petitioner appealed the Regional Director's decision to the BOP Central Office. See Appendix to Gov't Resp. to Pet. Traverse at 005. On February 2, 2004, the Central Office denied petitioner's appeal, stating that it "concur[red] with previous findings in that the Bureau of Prisons computed your sentence according to the applicable statutes and in accordance with Program Statement *5880.28, Sentence Computation Manual CCCA*." *Id.* at 004.

b. In May 2004, petitioner filed pro se the instant habeas corpus action under 28 U.S.C. 2241 against the warden of his institution.[5] He argued, *inter alia*, that "[c]ontrary to the p[l]ain language of 18 U.S.C. §3584(a)," respondent "has failed to properly grant prior jail credit time to Petitioner's sentence calculation and has refused to acknowledge and amend the appropriate changes." Pet. for Writ of Habeas Corpus at 3

---

[4] Section 3621(b) provides in pertinent part that "[t]he Bureau of Prisons shall designate the place of the prisoner's imprisonment." 18 U.S.C. 3621(b).

[5] At the time of petitioner's administrative complaint and the initiation of this action, L.E. Fleming was the warden of petitioner's federal institution; respondent is the current warden. Gov't C.A. Br. 2 n.1.